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David G. Duckworth DRUMMOND & DUCKWORTH 4590 Mac Arthur Blvd., Ste 500 Newport Beach, CA 92660			EXAMINER FADOK, MARK A	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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7 BEFORE THE BOARD OF PATENT APPEALS
8 AND INTERFERENCES
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11 *Ex parte* JEFFREY BRYSON
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14 Appeal 2008-3806
15 Application 09/609,231
16 Technology Center 3600
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19 Decided¹: April 9, 2009
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22 Before MURRIEL E. CRAWFORD, ANTON W. FETTING, and DAVID B.
23 WALKER, *Administrative Patent Judges*.
24 FETTING, *Administrative Patent Judge*.

25 DECISION ON APPEAL

26 STATEMENT OF THE CASE

¹ The two month time period for filing an appeal or commencing a civil action, as recited in 37 CFR § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

Jeffrey Bryson (Appellant) seeks review under 35 U.S.C. § 134 of a final rejection of claims 11-20 and 28-36, the only claims pending in the application on appeal.

We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b) (2002).

We REVERSE.

The Appellant invented a way for facilitating the negotiations for the purchase and sale of goods or services having negotiable prices over a global computer network such as the Internet (Specification 1:5-8).

An understanding of the invention can be derived from a reading of exemplary claim 11, which is reproduced below [bracketed matter and some paragraphing added].

11. A network system for facilitating the negotiation and purchase of goods or services for buyers and sellers, the system comprising:

[1] a host processor system;

[2] at least one buyer computer terminal including a display, operated by buyer of goods or services;

[3] at least one primary seller computer terminal including a display, operated by a primary seller of goods or services for selling the goods or services of the primary seller;

[4] a virtual seller computer terminal including a display, operated by a virtual seller of goods or services who is not the primary seller for selling the goods or services of the primary seller, said virtual seller not possessing custody or control of the goods or services of the primary seller but having a database storing product information concerning the goods or services of the primary seller;

[5] a first real time two-way communication connection for selectively connecting said buyer computer terminal to said primary

1 seller computer terminal or said virtual computer seller through said
2 host processor system, said first communication connection for
3 transmitting transaction data concerning the purchase of goods or
4 services of said primary seller, input by a buyer into said buyer
5 computer terminal, in real time to said seller computer terminal or to
6 said virtual seller computer terminal for display to said seller and for
7 transmitting transaction data, input by a seller into said seller
8 computer terminal or said virtual seller computer terminal, in real time
9 to said buyer computer terminal for display to the buyer;

10 [6] said host processor system including processing means for
11 selectively connecting a buyer computer terminal to either a primary
12 seller computer terminal or a virtual seller computer based upon
13 predetermined criteria, and

14 [7] a sale agreement means for enabling a buyer to reach an agreement
15 concerning the purchase of goods or services from a either a virtual or
16 a primary seller over the network system.

17 This appeal arises from the Examiner's Final Rejection, mailed September 22,
18 2006. The Appellant filed an Appeal Brief in support of the appeal on July 26,
19 2007. An Examiner's Answer to the Appeal Brief was mailed on October 18,
20 2007. A Reply Brief was filed on December 18, 2007.

21 PRIOR ART

22 The Examiner relies upon the following prior art:

Rose	US 5,309,513	May 3, 1994
Roberts et al.	US 6,295,551 B1	Sep. 25, 2001
Kannan	US 2001/0054064 A1	Dec. 20, 2001
Ahluwalia	US 6,728,685 B1	Apr. 27, 2004

23 REJECTIONS

24 Claims 11, 16, 18, and 20 stand rejected under 35 U.S.C. § 103(a) as
25 unpatentable over Ahluwalia, Roberts, and Rose.

Claims 14, 15, 17, and 35-36 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, Rose, and Official Notice^{2,3}.

Claims 12, 13, 19, and 28-30 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, Rose, and Kannan.

Claims 31-34 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, Rose, Kannan, and Official Notice.

ISSUES

The issues pertinent to this appeal are:

- Whether the Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 11, 16, 18, and 20 under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, and Rose.
- Whether the Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 14, 15, 17, and 35-36 under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, Rose, and Official Notice.
- Whether the Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 12, 13, 19, and 28-30 under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, Rose, and Kannan.
- Whether the Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 31-34 under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, Rose, Kannan, and Official Notice.

² The Examiner included claim 21-27 in this rejection (Answer 5), but these claims were cancelled in an amendment filed on October 31, 2005.

³ Claims 35 and 36 depend from claim 28 and are more properly included in the same rejection as claim 28.

The above issues turn on whether the art shows using a seller that does not maintain an inventory of its own to sell.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Facts Related to Claim Construction

01. A virtual seller is a seller that does not maintain an inventory of its own to sell (Specification 20:17 – 21:4).

Rose

02. Rose is directed to automatic call distributor systems (Rose 1:6-7).

03. Rose describes forwarding calls to ubiquitous agents at remote call centers when regular agents are unavailable (Rose 3:41-47).

04. Rose does not describe any of its agents as being sales agents.

Roberts

05. Roberts is directed to coordinating Internet multi-media communication such that the two users can view and modify a copy of the same multi-media content, where any modifications made by one user are subsequently viewed by a second user (Roberts 1:10-17).

06. Roberts describes routing a customer computer request to a secondary laptop queue, perhaps one with less experienced sales representatives, when the primary laptop queue had a predetermined number of call requests (Roberts 15:31-38).

Ahluwalia

07. Ahluwalia is directed to an electronic commerce communication schema related to online orders for consumer products having specific configurations (Ahluwalia 1: 55-60).
08. Ahluwalia shows a host processor system; a buyer computer terminal operated by a buyer of goods or services; and a primary seller computer terminal operated by a primary seller of goods or services for selling the goods or services of the primary seller (Ahluwalia 5:63 – 6:4; Fig. 1).
09. Ahluwalia's system is a real time two-way communication connection for connecting the buyer computer terminal to the primary seller computer terminal through the host processor system, and transmitting transaction data concerning the purchase of goods or services input by a buyer into said buyer computer terminal, in real time to said seller computer terminal for display to said seller and for transmitting transaction data, input by a seller into said seller computer terminal in real time to the buyer computer terminal for display to the buyer (Ahluwalia 2:60 – 3:21).
10. Ahluwalia describes a sales processor and an order processor that enable a buyer to reach an agreement concerning the purchase of goods or services from a seller over the network system (Ahluwalia 8:47-57).
11. Ahluwalia's "product provider" can be a retailer, dealer or even manufacturer of the product offered for sale (Ahluwalia 6:31-34). Ahluwalia's order process allows a customer to purchase a vehicle from dealer inventory, vehicles in-transit, or manufacturer orders scheduled to be built (Ahluwalia 18:62-65).

Kannan

12. Kannan is directed to on-line, live customer service between a potential customer and a customer service representative over the World Wide Web in real-time (Kannan 2:¶ 0019).

13. Kannan does not describe or suggest that any of its customer service representatives sell without maintaining an inventory of the company they work for.

Facts Related To Differences Between The Claimed Subject Matter And The Prior Art

14. None of the references applied in the rejections describe a seller that does not maintain an inventory of its own to sell.

Facts Related To The Level Of Skill In The Art

15. Neither the Examiner nor the Appellant has addressed the level of ordinary skill in the pertinent arts of systems analysis and programming, online sales transaction system design, and virtual shopping design. We will therefore consider the cited prior art as representative of the level of ordinary skill in the art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (“[T]he absence of specific findings on the level of skill in the art does not give rise to reversible error ‘where the prior art itself reflects an appropriate level and a need for testimony is not shown’”) (quoting *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985).

Facts Related To Secondary Considerations

16. There is no evidence on record of secondary considerations of non-obviousness for our consideration.

PRINCIPLES OF LAW

Claim Construction

During examination of a patent application, pending claims are given their broadest reasonable construction consistent with the Specification. *In re Prater*, 415 F.2d 1393, 1404-05 (CCPA 1969); *In re Am. Acad. of Sci. Tech Ctr.*, 367 F.3d 1359, 1364, (Fed. Cir. 2004).

Limitations appearing in the Specification but not recited in the claim are not read into the claim. *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1369 (Fed. Cir. 2003) (claims must be interpreted “in view of the specification” without importing limitations from the specification into the claims unnecessarily).

Although a patent applicant is entitled to be his or her own lexicographer of patent claim terms, in *ex parte* prosecution it must be within limits. *In re Corr*, 347 F.2d 578, 580 (CCPA 1965). The applicant must do so by placing such definitions in the Specification with sufficient clarity to provide a person of ordinary skill in the art with clear and precise notice of the meaning that is to be construed. *See also In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994) (although an inventor is free to define the specific terms used to describe the invention, this must be done with reasonable clarity, deliberateness, and precision; where an inventor chooses to give terms uncommon meanings, the inventor must set out any uncommon definition in some manner within the patent disclosure so as to give one of ordinary skill in the art notice of the change).

1 *Obviousness*

2 A claimed invention is unpatentable if the differences between it and the
3 prior art are “such that the subject matter as a whole would have been obvious at
4 the time the invention was made to a person having ordinary skill in the art.” 35
5 U.S.C. § 103(a) (2000); *KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1729-30
6 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 13-14 (1966).

7 In *Graham*, the Court held that that the obviousness analysis is bottomed on
8 several basic factual inquiries: “[1] the scope and content of the prior art are to be
9 determined; [(2)] differences between the prior art and the claims at issue are to be
10 ascertained; and [(3)] the level of ordinary skill in the pertinent art resolved.” 383
11 U.S. at 17. *See also KSR*, 127 S.Ct. at 1734. “The combination of familiar
12 elements according to known methods is likely to be obvious when it does no more
13 than yield predictable results.” *Id.* at 1739.

14 “When a work is available in one field of endeavor, design incentives and
15 other market forces can prompt variations of it, either in the same field or a
16 different one. If a person of ordinary skill can implement a predictable variation, §
17 103 likely bars its patentability.” *Id.* at 1740.

18 “For the same reason, if a technique has been used to improve one device,
19 and a person of ordinary skill in the art would recognize that it would improve
20 similar devices in the same way, using the technique is obvious unless its actual
21 application is beyond his or her skill.” *Id.*

22 “Under the correct analysis, any need or problem known in the field of
23 endeavor at the time of invention and addressed by the patent can provide a reason
24 for combining the elements in the manner claimed.” *Id.* at 1742.

ANALYSIS

Claims 11, 16, 18, and 20 rejected under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, and Rose.

The Appellant argues these claims as a group.

Accordingly, we select claim 11 as representative of the group.
37 C.F.R. § 41.37(c)(1)(vii) (2007).

The Examiner found that Ahluwalia described the host processor, buyer computer, and seller terminals of claim 11, and also described a customer assistance center available to negotiate. The Examiner found that Roberts described accessing a secondary sales operator when a primary sales representative is unavailable and also described a sales agreement. The Examiner further found that Rose described a real time two way communication for selectively connecting the buyer to the primary seller terminal or to a virtual seller terminal (Answer 4-5).

The Appellant contends that there is no motivation to combine the references (Br. 9) and that none of the references describe a virtual seller for selling the goods of another (Br. 10: First ¶). The Appellant contends that in Roberts, both sales agents are representatives of the primary seller (Br. 10: Second ¶) and that in Rose, there is no suggestion the agents are sales agents or are selling the goods of another (Br. 10: Third ¶). The Examiner responds that, as to motivation, the claimed invention is only the predictable use of prior art elements according to their established functions. *See KSR*, 127 S. Ct. at 1740. The Examiner responds that Rose describes ubiquitous sales agents that are alternates to the principal agents (Answer 10).

We agree with the Appellant. Ahluwalia describes the basic structure of claim 11 including the buyer and seller terminals, host processor, and real time two way

1 communication (FF 07 - 09). Ahluwalia's seller may be a dealer or a manufacturer
2 agent and may look up dealer inventory of manufacturer orders and inventory (FF
3 10 & 11). Thus, either seller can sell from either its own or the other seller's
4 inventory, but in either case the seller does maintain an inventory of its own and is
5 not a virtual seller according the Specification (FF 01).

6 Roberts describes the practice of automatically transferring a customer request
7 from a primary to a secondary agent when a primary agent is unavailable (FF 06).
8 Since agent unavailability is a universal problem, one of ordinary skill knew that it
9 would be an issue with implementing Ahluwalia's sales system, and therefore
10 would have known that Roberts use of an alternate agent was advisable in some
11 instances. Such automated switching as in Roberts would have resulted in the
12 second seller terminal and the selective switching between selling agents in claim
13 11. But again, both sellers would maintain an inventory and so neither would be a
14 virtual seller. Rose describes the use of ubiquitous agents in a remote call center
15 when regular agents are unavailable (FF 03). But none of Rose's agents are
16 described as sales agents and none are described as selling without maintaining an
17 inventory (FF 04). Thus none of the references applied in the rejections describe a
18 seller that does not maintain an inventory of its own to sell (FF 14), and so none
19 describe or suggest a virtual seller.

20 The Appellant has sustained its burden of showing that the Examiner erred in
21 rejecting claims 11, 16, 18, and 20 under 35 U.S.C. § 103(a) as unpatentable over
22 Ahluwalia, Roberts, and Rose.

23 *Claims 14, 15, 17, and 35-36 rejected under 35 U.S.C. § 103(a) as unpatentable*
24 *over Ahluwalia, Roberts, Rose, and Official Notice.*

1 Claims 14, 15, and 17 depend from claim 11, whose rejection we did not
2 sustain *supra*. Appellant has therefore similarly sustained its burden of showing
3 that the Examiner erred in rejecting claims 14, 15, 17 under 35 U.S.C. § 103(a) as
4 unpatentable over Ahluwalia, Roberts, Rose, and Official Notice. Claims 35 and
5 36 depend from claim 28 and are more properly treated with claim 28.

6 *Claims 12, 13, 19, and 28-30 rejected under 35 U.S.C. § 103(a) as unpatentable*
7 *over Ahluwalia, Roberts, Rose, and Kannan.*

8 Claims 12, 13, and 19 depend from claim 11, whose rejection we did not
9 sustain *supra*. Independent claim 28 contains limitations directed to a method
10 similar to the limitations directed to claim 11's system. Kannan does not describe
11 or suggest sellers who do not maintain their own inventory, and so does not make
12 up for the deficiency in Ahluwalia, Roberts, and Rose (FF 13). Claims 29 and 30
13 depend from claim 28. The Appellant has therefore similarly sustained its burden
14 of showing that the Examiner erred in rejecting claims 12, 13, 19, and 28-30 under
15 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, Rose, and Kannan.

16 Also, claims 35 and 36 depend from claim 28 and their rejection is more
17 properly included here. Accordingly, we find that the Appellant has also sustained
18 its burden of showing the Examiner erred in rejecting claims 35 and 36.

19 *Claims 31-34 rejected under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia,*
20 *Roberts, Rose, Kannan, and Official Notice.*

21 Claims 31-34 depend from claim 11, whose rejection we did not sustain *supra*.
22 The Appellant has therefore similarly sustained its burden of showing that the
23 Examiner erred in rejecting claims 31-34 under 35 U.S.C. § 103(a) as unpatentable
24 over Ahluwalia, Roberts, Rose, Kannan, and Official Notice.

CONCLUSIONS OF LAW

The Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 11-20 and 28-36 under 35 U.S.C. § 103(a) as unpatentable over the prior art.

DECISION

To summarize, our decision is as follows:

- The rejection of claims 11, 16, 18, and 20 under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, and Rose is not sustained.
- The rejection of claims 14, 15, and 17 under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, Rose, and Official Notice is not sustained.
- The rejection of claims 12, 13, 19, 28-30, and 35-36 under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, Rose, and Kannan is not sustained.
- The rejection of claims 31-34 under 35 U.S.C. § 103(a) as unpatentable over Ahluwalia, Roberts, Rose, Kannan, and Official Notice is not sustained.

REVERSED

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